IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 7 OF 2005.

Mr. Brian Fernandes,
unmarried, aged 27 years,
r/o Flat No.S-1, Kamat Nagar,
Opp. Vijaya Bank,
Panaji, Goa. .... Petitioner.

Versus

State,
(Through Anti Narcotic Cell
Police Station, Panaji, Goa). .... Respondent.

Shri G. Kanekar, Advocate for the Petitioner.

Shri S.N. Sardessai, Public Prosecutor for the State/Respondent.

CORAM: N. A. BRITTO, J.

DATE: 7th April, 2005.

ORAL ORDER:

This revision is directed against the Order dated 2.2.05 of the learned Special Judge in Special Cr.Case No.27/04 dismissing the application of the petitioner dated 5.1.05 for a separate trial.

2. Some facts are required to be stated to dispose of the present revision.

3. The said case was filed against Brian Fernandes (petitioner herein) and

one Ulhas MadMalgaonkar to prosecute the said accused under Section 20(b)(ii)(c) of the N.D.P.S. Act, 1985.

4. The said charge-sheet was filed in the background of the facts which are as follows :-

On 9.10.04 at about 13.30 hrs. specific and reliable information was received that Ulhas Malgaonkar (A.2) will deliver charas to his customer between 15.00 hrs to 16.00 hrs. Pursuant to the said information, the raiding party remained present at the KTC bus stand, Panaji when they saw the said Ulhas Malgaonkar walking from the alighting point and going towards Deendayal Swayam Rojgar Yojna kiosks and talking to another person who was waiting there, namely A.1 Brian Fernandes. The said Ulhas Malgaonkar was found with a polythene bag in his right hand and in the said bag there were 1.05 kgs. of haras. A.1 Brian was suspected to be carrying charas on his person and his personal search was taken and what was found with him ultimately turned out to be 62 gms. of charas. Based on the aforesaid facts, a common charge sheet was filed against both the accused and by the said application dated 5.1.05 the petitioner (A.1 in the said case) sought a separate trial for him as his alleged possession of the said charas was not at all connected to the possession of charas by A.2 Ulhas Malgaonkar. The

said application came to be rejected by the learned Special Judge stating that the application was rather premature as the prosecution would be in a position to show by cogent evidence that the petitioner was also in conscious possession of 1.05 gms. of charas which otherwise were admittedly found with A.2 Malgaonkar over and above 62 gms. of charas allegedly found with the petitioner/accused No.1.

5. Shri Kanekar, the learned Advocate of the Petitioner/A.1 has submitted that the prosecution has made no mention so far as to what both the accused were talking and accused Brian Fernandes had not even seen as to what the accused Ulhas Malgaonkar was carrying in his polythene bag and both of them just happened to meet one another at the said bus stand. Shri Kanekar submits that on the facts stated by the prosecution, it could not be said that one was in conscious possession of the charas found with another.

6. Shri Sardessai, the learned P.P. on the other hand, submits that both the said accused were carrying drugs in the course of the same transaction and in this connection Shri Sardessai has referred to clause (d) of Section 223 of the Code of Criminal Procedure, 1973 which reads as follows :-

" (b) persons accused of different offences committed in the

course of the same transaction .”

7. Admittedly, Section 223 of the Code deals with persons who can be charged jointly and specifies 7 different situations under which persons could be charged and tried together. As per the prosecution, the case of the petitioner is covered by clause (d) of S.223 of the Code and not by other clauses. In other words, the case of the prosecution is that both the accused committed the said offence in the course of the same transaction. In my view it was incumbent upon the prosecution to have shown how at present, and not in future, that on facts alleged, both the accused could be tried together.

8. From the facts alleged, all that can be seen is that both the accused were found at one spot talking to one another and each of them having different quantities of charas. The argument that the prosecution will be able to show in future that one was in possession of charas found on the person of the other, appears to be too far fetched, in the absence of any other circumstances having been brought on record. Cogent evidence that the petitioner was in conscious possession of 1 kg. 5 gms. found with A.2 could be led only by falsehood and or by improving the case of prosecution. It is true that the word 'transaction' has not been defined anywhere in the Code, but the said words 'same

transaction' contemplates commonality of purpose or design and continuity of action. From the facts stated, it appears that each of them were carrying the quantity which was found in their possession. For example, they might have also been carrying handkerchiefs in their pockets and it could not be said that the said handkerchiefs were being carried in the course of same transaction. As far as the facts of this case are concerned, it could not be said that both of them were individually carrying the said charas in the course of the same transaction. In my view, since the case of both the accused was not covered by what is stated in S.223 of the Code, they could not have been tried together. In my view, the learned Special Judge ought to have allowed the application and tried both the accused separately, but simultaneously and pass a judgment based on the evidence produced by the prosecution in the trial of each of the accused, separately.

8. Consequently the revision petition succeeds. The impugned Order dated 2.2.2005 of the learned Special Judge, is hereby set aside. Consequently the application filed by the petitioner/accused no.1 is allowed and the learned Special Judge is hereby directed to try the petitioner/A.1 separately but simultaneously and pass a judgment in both

the cases in accordance with law and on the basis of the evidence to be produced by the prosecution at each trial.

N. A. BRITTO, J.

sl.